UNITED
NATIONS

AT

Administrative Tribunal

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LIMITED

AT/DEC/483
25 May 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 483

Case No. 518: KLECKNER

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Francisco A. Forteza;

Whereas, at the request of Simone Marie Kleckner, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 August 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 14 August 1989, the Applicant filed an application, the pleas of which read as follows:

"II. PLEAS

10. With regard to its competence and procedure, the Applicant respectfully requests the Tribunal:

(a) to find that it is competent to hear and pass judgement upon the present application under Article 2 of its Statute;
(b) to consider the present application receivable under Article 7 of its Statute;
(c) to decide to hold oral proceedings of the Tribunal on the present application in accordance with Article 8 of its Statute and Chapter IV of its Rules.

11. On the merits, the Applicant requests the Tribunal:

(a) to rescind the decision of the Secretary-General rejecting the unanimous recommendation of the Joint Appeals Board to remand the Applicant's case to the Appointment and Promotion Board for rectification;

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(b) to find that the Joint Appeals Board was correct as a matter of law in finding that the advice of the Assistant Secretary-General for Human Resources Management*, which resulted in the Applicant's exclusion from the 1986 Promotion Register was discriminatory and unfair and was therefore ultra vires;

(c) to find that by introducing an extraneous element into the rules governing promotion which was not the subject of proper consultation nor communicated to the staff, the Respondent violated the Staff Rules and Regulations as well as the commitment made to the Applicant regarding her promotion;

(d) to find that as a matter of equity the Secretary-General was obliged to honor the commitment made to the Applicant which induced her to accept the functions of a higher level post in the expectation of being promoted in 1986;

(e) to order the Respondent to respect his obligation to the application[sic] by re-submitting her recommendation for promotion to the Appointment and Promotion Board with a view to implementing any resulting promotion from 1 October 1986;

(f) to order the Respondent to recalculate the pension benefits of the Applicant on the basis of the salary she would have received had she been promoted to the P-5 level effective 1 October 1986;

(g) to fix, pursuant to article 9, paragraph 1 of the Statute, the amount of compensation to be paid in lieu of specific performance to [US]$15,000, calculated as follows:

(i) loss of salary and allowances, representing the difference between salary and allowances at P-4, step VII and P-5, step I, for six months;

(ii) loss of pension entitlements reflecting a reduction in the Applicant's future pension (based on average life expectancy of 82 years and all applicable cost-of-living adjustments);

(iii) compensatory damages for the moral and emotional injuries suffered as a result of loss of promotion."

Whereas the Respondent filed his answer on 29 December 1989;

Whereas the Applicant filed written observations on 2 February 1990;

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* Successor OPS

Whereas, on 9 March 1990, the Applicant submitted a request for reimbursement of costs and other expenses incurred by her counsel in preparing the appeal; and on 29 March 1990, the Respondent submitted his comments thereon;

Whereas, on 19 March 1990, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 25 April 1990, the Respondent informed the Tribunal that he had decided to promote the Applicant "retroactively to the P-5 level from 1 October 1986 and as a consequence [the Applicant would] be paid the appropriate salary and allowances and her pension entitlement [would] be recalculated;"

Whereas, on 26 April 1990, the Tribunal asked the Applicant whether she maintained her appeal and on 27 April 1990 and 3 May 1990, the Applicant informed the Tribunal that:

> "[she] maintain[ed] her application insofar as it concerns the compensation due the Applicant for the moral and emotional injury sustained as a result of the unconscionable delay of almost four years in obtaining her rights as well as the request for reimbursement of legal and administrative expenses incurred in pursuing her appeal, now totalling over [US]$3000.00."

Whereas the facts in the case are as follows:

Simone Marie Kleckner entered the service of the United Nations on 27 January 1975, as a Librarian at the P-3, Step I level, in charge of the Legal Branch of the Dag Hammarskjold Library, at the Department of Conference Services (DCS). Her post was part of the Library's General Reference Section. She served initially on a series of fixed-term appointments until 16 February 1977, when she was offered a probationary appointment. On 1 November 1977, her appointment became permanent and on 1 April 1982, she was promoted to the P-4 level.

On 20 March 1986, the Secretary-General announced to the staff in ST/SGB/217 that the Organization was confronting a financial crisis and that he intended to implement immediately a series of economy measures in order to redress the situation. One of such measures was the suspension of the 1986 promotion review process for six months.

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On 9 April 1986, the Applicant applied for the job of Chief of Reference and Bibliography Section, a post at the P-5 level and was selected. On 1 July 1986, the Applicant was appointed Officer-in-Charge of the Reference and Bibliography Section and on 1 October 1986, she was officially designated Chief of the Section.

On 15 September 1986, the Assistant Secretary-General for Personnel Services had announced to the staff in ST/IC/86/48 the procedures to be followed in connection with the 1986 promotion review. The Appointment and Promotion Board (APB) was finally constituted in December 1986 and commenced its review of staff eligible for promotion in February 1987. At a meeting held on 12 March 1987, members of the APB raised a question concerning promotion of staff who had already separated from the service of the Organization. On 13 March 1987, the Assistant Secretary-General for Human Resources Management (OHRM*) advised the Chairman of the Board that "one of the essential conditions for promotion is that the staff member be in the active service of the Organization at the time of implementation of the promotion by the issuance of a P-5 action". He emphasized that "a promotion is precluded, therefore, in situations where the staff member is deceased, separated from the Organization or on special leave without pay at this particular moment".

The Applicant, who had been recommended for promotion to the P-5 level by her Department, reached the mandatory retirement age on 31 March 1987 and separated from the service of the Organization on that date. A request of 22 September 1986, by her Department, for the exceptional extension of her services beyond retirement age had been turned down - on account of the financial crisis confronting the Organization.

On 17 June 1987, the Assistant Secretary-General, OHRM, announced to the staff in ST/IC/87/35, the 1986 Senior Officer (P-5) Promotion Register. The Register contained the names of staff that the Secretary-General, having considered the recommendations of the APB, had agreed to include in the Register. In accordance with the package of economy measures designed to redress the financial crisis set forth in ST/SGB/217, promotions from all Registers were implemented retroactive to 1 October 1986 and not 1 April 1986.

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* Successor OPS

According to a statement by the Representative of the Respondent before the Joint Appeals Board (JAB), when the 1986 APB was considering promotions to the P-5 level, it noted that "Mrs. Kleckner had been recommended for promotion in 1986 by her Department (DCS)" and "was well aware of the fact that she was performing P-5 level functions". Accordingly, "on this basis [the APB] recommended the inclusion of [Mrs. Kleckner's] name in the Register". However, since the Board completed its promotion review after the date of Mrs. Kleckner's separation from service, "her name and the names of five other staff members, no longer in service but initially included [in the Register], were deleted from the 1986 Promotion Register when the latter were issued [by the Assistant Secretary-General, OHRM, later in 1987]".

The Applicant's name was not included in the Senior Officer (P-5) Promotion Register and on 3 July 1987, she instituted a recourse procedure, requesting the Secretary-General to include her name therein. She argued essentially, that her name would have been included in the Register, had she not been considered to be among the category of staff who had been separated from service at the time promotions were implemented, in accordance with the advice given to the APB by the Assistant Secretary-General, OHRM. The Applicant was unsuccessful in her recourse.

On 23 April 1988, the Applicant requested the Secretary-General to review the administrative decision not to include her name in the 1986 Senior Officer (P-5) Promotion Register. Having received no reply from the Secretary-General, on 10 June 1988, the Applicant lodged an appeal with the JAB. The Board adopted its report on 21 December 1988. Its conclusions and recommendation read as follows:

"Conclusions and recommendation

26. The Panel concludes that the advice of the Assistant Secretary-General of 13 March 1987, that a promotion is precluded in situations were the staff member is not in active service at the time of the implementation of the promotion by the issuance of the P-5 action, was not a legitimate exercise of the authority delegated to him by the Secretary-General since it violated the principles of equity and fairness, and that it should therefore not have been applied by the APB.

27. Consequently, the Panel recommends that the appellant's case be remanded to the APB for rectification."

On 3 March 1989, the Under-Secretary-General for Administration and Management informed the Applicant that:

"...

The Secretary-General having re-examined your case in the light of the Board's report has decided to maintain his discretionary decision not to promote you to the P-5 level following your separation from service upon your retirement on 31 March 1987. The Secretary-General has noted that you had the benefit of a full and fair review of your case by the appropriate appointment and promotion bodies in the 1986 annual promotion review. In this connection, the Tribunal has consistently held that qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy. Furthermore, in the context of the financial crisis and in accordance with established policy and practice, you were not included in the 1986 Promotion Register since you were already separated from the Organization before completion of the 1986 promotion review.

Notwithstanding the above, the Secretary-General has decided, taking into account the entire circumstances of your case, to grant you a special post allowance to the P-5 level for a three month period from 1 January 1987 to 31 March 1987 in accordance with the relevant staff rules and to take no further action on the matter.

...".

On 14 August 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was entitled to a fair and adequate consideration for promotion.

2. The memorandum of 13 March 1987, by the Assistant Secretary-General, OHRM, to the Chairman of the APB clearly constituted an undue interference with the independent functioning of the APB, which was prejudicial to the Applicant.

3. It would be contrary to every notion of fairness and equity to deny the Applicant her promotion because of unforeseen delays occasioned by the Respondent.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's established policy not to grant valedictory promotions is a valid exercise of administrative discretion in the interests of the Organization and is consistent with the Staff Regulations which envisage retirement at age 60.

2. The Applicant's rights were not violated by suspension of the 1986 promotion review for six months because of the financial crisis.

The Tribunal, having deliberated from 26 April to 25 May 1990, now pronounces the following judgement:

I. The Tribunal has been informed by the Respondent, at the commencement of its deliberations, that on 17 April 1990, the Assistant Secretary-General for Human Resources Management (OHRM) informed the Applicant that he had decided to promote her retroactively to the P-5 level, from 1 October 1986 until the date of her retirement.

In reply to a question put by the Tribunal, the Applicant informed the Tribunal that she maintained her application "insofar as it concerns the compensation due [to her] for the moral and emotional injury sustained as a result of the unconscionable delay of almost four years in obtaining her rights as well as the request for reimbursement of legal and administrative expenses incurred in pursuing her appeal, now totalling over [US]$3000."

II. Accordingly, the questions now presented to the Tribunal are:

(a) Whether, as the Applicant claims, she is entitled to compensation "for the moral and emotional injury sustained as a result of the unconscionable delay of almost four years in obtaining her rights ...";

(b) Whether the Applicant's Counsel is entitled to "reimbursement of legal and administrative expenses incurred in pursuing [the Applicant's] appeal ...".

III. The Applicant, having reached the mandatory age of separation from service, retired from the Organization effective 31 March 1987. Although the Applicant had been recommended for a promotion to the P-5 level by the Department of Conference Services, in connection with the 1986 promotion review exercise, the Appointment and Promotion Board (APB) did not consider the Department's recommendation until 1987, on account of the financial crisis of the Organization. As an economy measure designed to redress this crisis, promotions from the 1986 Registers were implemented with retroactive effect from 1 October 1986, for pay purposes and with retroactive effect from 1 April 1986, for seniority purposes. The Applicant's name was not included in the Senior Officer (P-5) Promotion Register. The Applicant contends that this was solely because of a communication of 13 March 1987, from the Assistant Secretary-General, OHRM, to the APB, to the effect that "one of the essential conditions for promotion [is] that the staff member be in active service of the Organization at the time of the implementation of the promotion by the issuance of a P.5 action form".

IV. In the light of the decision of 17 April 1990, by the Assistant Secretary-General, OHRM, the Tribunal need not determine whether the 13 March 1987 statement conveyed by the Assistant Secretary-General, OHRM, to the APB correctly stated a rule applicable to promotions, nor whether the interpretation given by the Respondent as to its effect on the Applicant was correct.

V. The Tribunal must determine what loss, if any, the Applicant suffered by the Respondent's delay of four years in reviewing the Applicant's case, review which led him to decide on 17 April 1990, to promote her retroactively to the P-5 level from 1 October 1986.

VI. The Tribunal notes that in its report dated 21 December 1988, the Joint Appeals Board (JAB) recommended that the Applicant's case "be remanded to the APB for rectification" in light of its finding that the statement conveyed to the APB by the Assistant Secretary-General, OHRM, on 13 March 1987 "was not a legitimate exercise of the authority delegated to him by the

Secretary-General since it violated the principles of equity and fairness, and ... should therefore not have been applied by the APB". The Tribunal further notes that the Respondent did not accept the JAB's recommendation, but decided, on 3 March 1989, to grant the Applicant "a special post allowance to the P-5 level for a three-month period from 1 January 1987 ... and to take no further action on the matter."

VII. The Tribunal notes that the Applicant had an excellent service record; her performance evaluation reports indicate that she was an outstanding staff member and she was highly regarded by her supervisors. The Tribunal finds that the Respondent's delay in admitting that the Applicant would have been entitled to a promotion to the P-5 level, had the financial crisis of the Organization not prompted the ruling conveyed by the Assistant Secretary-General, OHRM, to the APB in March 1987, was an inordinately long delay and caused the Applicant unnecessary injury. Therefore the Administration's responsibility is entailed. The Applicant has suffered a wrong for which she is entitled to compensation. The Tribunal assesses the amount of compensation due to the Applicant at US$2,000. This compensation should be paid in addition to the three months of special post allowance to the P-5 level, payable to her in accordance with the Secretary-General's decision of 3 March 1989 on the JAB's recommendation.

VIII. According to Counsel for the Applicant, the amount of legal and other administrative expenses incurred in pursuing the appeal is over US$3,000. The Respondent has contested Counsel for the Applicant's request for legal costs on the ground that Counsel for the Applicant served on the Panel of Counsel when he prepared and submitted the application and was therefore not entitled to any remuneration.

IX. In this connection, the Tribunal reiterates its holding in Judgement No. 237, Powell, para. XXIX, (1979) that:

> "As regards costs, the Tribunal has declared in its statement of policy contained in document A/CN.5/R.2 dated 18 December

> 1950 that in view of the simplicity of its proceedings [as laid down in its Rules] the Tribunal will not, as a general rule, grant costs to Applicants whose claims have been sustained by the Tribunal. Nor does the Tribunal order costs against the Applicant in a case where he fails. In exceptional cases, the Tribunal may, however, grant costs if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal".

In addition, the Tribunal recalls that, as in Janitschek, Judgement No. 449 (1989), the request for costs has been made in this case "without amending the Applicant's pleas and cannot be properly introduced by inclusion in the Applicant's written submissions".

The Tribunal concurs with the Respondent, that as Counsel for the Applicant served on the Panel of Counsel when he agreed to represent her, he is not entitled to reimbursement of his legal expenses. In accordance with ST/AI/163/Rev.1 on Assistance and Representation by Counsel in Disciplinary and Appeal Cases, the Organization provides staff with legal assistance free of charge. Accordingly, the Tribunal holds that Counsel for the Applicant has no right to charge for legal assistance. Consequently, the Tribunal rejects the Applicant's claim in this regard.

X. In the light of the foregoing, the Tribunal orders the Respondent to pay to the Applicant compensation in the amount of US$2,000.

XI. All other pleas are rejected.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Francisco A. FORTEZA
Member

R. Maria VICIEN-MILBURN
Executive Secretary

Geneva, 25 May 1990

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/484
19 October 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 484

Case No. 499: OMOSOLA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr. Francisco A. Forteza;

Whereas, at the request of Martin Kayode Omosola, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 March, 31 July and 30 November 1986, the time-limit for the filing of an application to the Tribunal;

Whereas, at the request of the Applicant, the Tribunal suspended, under article 7, paragraph 5 of its Statute, the time-limit for the filing of an application to the Tribunal, first, until 30 June 1987 and then, until 30 September 1988;

Whereas, on 16 September 1988, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 26 January 1989, the Applicant, after making the necessary corrections, again filed an application, containing the following pleas:

"II. PLEAS

On 22 August 1983, the Secretary-General dismissed me 'for misconduct' (...). I rejected this decision and

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appealed to the Joint Appeals Board. The Board's recommendation fell short of my expectation. I hereby urge the United Nations Administrative Tribunal to adjudicate on the case by:

(a) rescinding the Secretary-General's decision;

(b) ordering the payment of compensation exceeding the equivalent of my two years' net base salary for the injuries sustained as a result of the termination of my appointment;

(c) further ordering the Respondent to pay my arrears of within-level increment, G.6/V, 1 August 1982 to 31 July 1983 and 1 to 22 August 1983 for G.6/VI; and

(d) compelling the Secretary-General to pay me a Special Post Allowance (SPA) from 1 April 1982 to 22 August 1983."

Whereas the Respondent filed his answer on 15 September 1989;

Whereas, on 25 April 1990, the Applicant filed written observations;

Whereas, on 31 May 1990, the Tribunal informed the parties that it adjourned its consideration of the case until the Tribunal's Autumn session;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Information Centre (UNIC), Department of Public Information (DPI), in Lagos, Nigeria, on 1 August 1971, as a Senior Clerk/Projectionist at the G-5 level. During the course of his employment with the U.N., he was granted a permanent appointment on 1 August 1974 and was promoted to the G-6 level on 1 April 1979. At the time of the events that gave rise to the present proceedings, the Applicant worked as a Senior Information Clerk/Senior Projectionist.

On 22 March 1982, the Assistant Administrator, Bureau for Finance and Administration, of the United Nations Development Programme (UNDP) informed the Chief, Centres Administrative Unit, Field Operations Division, DPI, that UNDP had discovered that "virtually all UNDP locally recruited staff members in [the UNDP] office in Lagos, Nigeria, [had] been submitting over the past several years fraudulent medical claims and improperly receiving reimbursement therefor under Appendix E to the Staff Rules (Medical Expense Assistance Plan)". UNDP found that a large number of staff had sought reimbursement under the Plan for services rendered by non-existent

physicians, as confirmed by the Nigeria Medical Council, with whom physicians in Nigeria are required to register. Accordingly, UNDP decided to suspend nine staff members without pay and charged all staff involved with misconduct. As a "precautionary measure", UNDP instructed the Resident Representative, who acted as Director of UNIC, to suspend processing all medical claims, including medical claims filed by U.N. locally recruited staff, pending completion of their investigation.

On 29 March 1982, the Executive Officer, DPI, wrote to the competent Personnel Officer, to inform her that, as a result of an investigation of all medical claims submitted by UNIC staff during 1980-1981, it appeared that seven staff members, including the Applicant, had submitted claims for reimbursement of medical expenses incurred for services rendered by non-existent physicians. In line with the disciplinary measures taken by UNDP against UNDP staff involved in the same scheme, he recommended that UNIC staff involved be suspended without pay pending the outcome of the investigation.

In a letter dated 2 April 1982, the Executive Officer, DPI, informed the Applicant that he was being charged with serious misconduct arising from his submission of false medical claims. The Applicant was asked to provide his version of the facts. In a reply dated 21 April 1982, the Applicant explained that he had personally paid the doctors in question before claiming reimbursement; that he was surprised to learn that those doctors were not registered with the Nigeria Medical Council and that it was not the practice in Nigeria to ask for a doctor's credentials. He also pointed out that one of the physicians, Dr. Da Silva, was listed as a "U.N. Designated Physician".

On 29 April 1982, the Executive Officer, DPI, wrote to the Resident Representative, UNDP, and Acting Director, UNIC, Lagos, attaching copies of the different explanations provided by UNIC staff charged with serious misconduct, including the Applicant, and requested his views and recommendations on their cases. As a result of a further investigation and inquiries with the Nigeria Medical Council, UNDP concluded that except for four doctors who did not appear on claims by UNIC staff members, all the other doctors were "considered fictitious".

At the request of the Under-Secretary-General, DPI, the Office of Personnel Services (OPS), directed a Personnel Officer from Headquarters to conduct an investigation in Lagos, pursuant to Personnel Directive PD/1/76 concerning Disciplinary Procedure for Staff Serving at Offices away from Headquarters and Geneva. In his report dated 3 December 1982, addressed to the Director of Personnel Administration, the Personnel Officer found that:

> "... the charge of misconduct against Messrs ... Omosola ... is supported by the fact that the medical claims in question were made fraudulently, the principal proof being that the physicians and hospitals whose names were used by the claimants have been found to be fictitious and non-existent ...".

On 22 February 1983, the Applicant wrote to the UNIC Acting Director, submitting his comments on the Personnel Officer's report and explained that the impossibility to locate the doctors for whose services he had sought reimbursement could be attributed to the fact that they "had absconded from the Lagos area to the country's interior where the authorities would find it difficult to trace them, as the unregistered doctors were aware of the illegality of their actions".

On 23 June 1983, the Assistant Secretary-General for Personnel Services submitted to the Secretary-General his recommendations for disciplinary action to be taken against the seven UNIC staff members, including the Applicant, found to have submitted several fraudulent medical claims. He stated in this regard:

> "...
>
> 13. It is my understanding that the UNDP used level of post as one of the criteria for determining whether a staff member was to be summarily dismissed or given a letter of censure...
>
> 14. My recommendations as to disciplinary measures are based on the seriousness of the misconduct by the staff member. In cases where there was a pattern of misconduct extending over a period of time, I have recommended dismissal. In the case where there was only one fraudulent submission, I have recommended suspension from duty without pay for one year.
>
> 15. I also wish to emphasize that, although the whole situation was examined from an over-all standpoint for consistency purposes, the case of each UNIC, Lagos staff member was individually examined by the Administrative Review

> Unit with utmost care. I am satisfied that both the provisions of Personnel Directive PD/1/76 and the fundamental requirements of due process were fully observed in each and all cases...".

He recommended that six UNIC staff members, including the Applicant, be dismissed for misconduct under Staff Rule 110.3(b). The Under-Secretary-General for Administration and Management approved the recommendation on the Applicant's case on 19 July 1983.

On 28 July 1983, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to dismiss him for misconduct as a disciplinary measure under Staff Rule 110.3(b). He stated in this regard:

> "...
>
> The Secretary-General's decision was taken upon his finding that you submitted under the Medical Expense Assistance Plan four fraudulent medical claims thereby receiving improper reimbursement of [Nigerian naira] 1094.95 or US$1979.89. The Secretary-General concluded that such behaviour constituted seriously unsatisfactory conduct warranting disciplinary action.
>
> ..."

On 29 August 1983, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 3 December 1984. Its conclusions and recommendations read as follows:

> "CONCLUSIONS AND RECOMMENDATIONS
>
> 139. The Panel finds that the documentation contained in the disciplinary file was not sufficient to support the findings of fact on the basis of which the Secretary-General made his determination of the appellant's misconduct.
>
> 140. Having reviewed the investigations carried out by UNDP and OPS of the medical claims submitted between 1980 - 1981 by the local staff of Lagos, and having received additional documents and testimony with regard to these investigations, the Panel finds that there was very significant circumstantial and indirect evidence to support the findings of fact that the names of doctors and hospitals appearing in four insurance claims submitted by the appellant during the period under review were fictitious and non-existent.

141. The Panel therefore concludes that the Secretary-General had been furnished with sufficient evidentiary elements to enable him to make his determination of the appellant's misconduct with a reasonable degree of certainty.

142. Having carefully considered the appellant's observations after he had the opportunity to examine that evidence during the appeal proceedings, the Panel further concludes that there were no reasons to believe that the outcome of the case would have been different had he been given that opportunity during the disciplinary proceedings.

143. The Panel further concludes that the disciplinary measure of dismissal imposed on the appellant appeared justified on the basis of the criterion applied to this case as explained by the Assistant Secretary-General, OPS.

144. However, the Panel notes that the UNDP administration had applied a different criterion as a result of which those staff members whose cases were similar to the appellant's from the point of view of the seriousness of the misconduct and also from the point of view of their official status, had received written sanctions.

145. The Panel therefore, without entering into the intrinsic merits of the different sanctions imposed, concludes that the application of different criteria by two authorities within the United Nations system had resulted in manifest injustice and inequity to the appellant because of the drastically different treatment of staff members in essentially similar situations.

146. The Panel does not consider that the unevenness of the situation alone could justify changing the disciplinary measure of dismissal to a less severe sanction unless there was a clear error of judgement in imposing that sanction. However, the Panel does think that the resulting inequity called for acknowledgement and, to the extent possible, relief.

147. The Panel therefore recommends that the Secretary-General grant the appellant monetary compensation in an amount equivalent to three months net base salary in recognition and mitigation of this inequity."

On 30 April 1985, the Assistant Secretary-General, OPS, informed the Applicant that the Secretary-General, having re-examined his case in light of the Board report, had decided:

"(a) to maintain the contested decision, and

(b) to reject the Board's recommendation for payment of compensation ..."

On 26 January 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent, in applying to UNIC staff different sanctions from those applied by UNDP to its staff, discriminated against UNIC staff and violated the principle of equal treatment.

2. The decision to dismiss the Applicant was unfair and arbitrary.

3. The Applicant was deprived of due process.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision to dismiss the Applicant was justified by the evidence against him and was arrived at after due investigation and proper procedure.

2. The Secretary-General's decision to dismiss the Applicant and to refuse to accept the JAB recommendation to pay three months' compensation was a valid exercise of his discretion to impose disciplinary measures.

3. Claims which have not been previously submitted to the JAB may not be presented to the Tribunal except where the Secretary-General and the Applicant have so agreed.

The Tribunal, having deliberated on 8 May 1990 in Geneva, and from 9 October to 19 October 1990 in New York, now pronounces the following judgement:

I. The Applicant served at the United Nations Information Centre in Lagos, Nigeria, from 1971 until 1983, when he was dismissed for misconduct. He challenges the 30 April 1985 decision of the Secretary-General maintaining his decision to dismiss the Applicant under Staff Rule 110.3(b) for misconduct, and the Secretary-General's rejection of the Joint Appeals Board (JAB) recommendation for payment of compensation. The misconduct

consisted of the Applicant having submitted fraudulent claims for medical treatment under Appendix E to the Staff Rules and improperly having received reimbursement therefor. In reliance on an investigation of its own, and following one conducted by UNDP, the Administration concluded that some staff members in Nigeria had submitted and collected on medical claims for treatment by doctors who, it was subsequently discovered, were non-existent. The Applicant had submitted and collected on false medical claims, the amount of US$1,979.89 over a two year period.

II. The JAB, which very carefully and thoroughly analyzed the evidence, found that the Respondent, in dismissing the Applicant, did so on the basis of very significant circumstantial and indirect evidence that the Applicant had submitted insurance claims based on medical receipts from fictitious physicians. Thus, the JAB considered that the Respondent's conclusion that the Applicant had been guilty of misconduct was "justified and reasonable". The Tribunal, having reviewed the evidence, is likewise satisfied that, where numerous staff members, allegedly without communicating with one another with respect to medical doctors, (1) turned out to be using the same doctors; (2) the doctors were allegedly located in unusually distant and difficult-to-reach locations; (3) there was no objective evidence that the doctors or their clinics, hospitals or offices were ever there or that they ever existed; (4) the doctors and their clinics, hospitals or offices allegedly vanished without a trace once efforts to verify their existence were undertaken; and (5) some of the individuals involved in such medical claims admitted that they were fraudulent, the Respondent could not reasonably be said to have been mistaken in his evaluation of the facts. This does not mean, however, that the Tribunal is necessarily in accord with all of the views of the JAB as regards the burden of proof. The Tribunal notes that in prior cases where staff members have applied for and received benefits from the Organization and questions of fraudulent conduct have arisen, the Tribunal has held that once a prima facie case of misconduct is established, the staff member must provide satisfactory proof justifying the conduct in question. The Tribunal recognizes, as did the JAB, the need for presentation by the Respondent of adequate evidence (documentary or otherwise) with respect to the details of investigations in support of the conclusions and recommendations of those conducting the investigations.

III. As the Tribunal has emphasized in other recent cases involving fraudulent medical claims, e.g. Judgement No. 394, Armijo (1987), para. XII, the Secretary-General has:

> "... wide discretion ... for dealing forcefully with cases of fraud against the Organization, to make it clear to all concerned that they act at their peril when they engage in such reprehensible conduct.
>
> The Tribunal recalls also that it has in its jurisprudence consistently recognized that the Secretary-General's authority to take decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional conditions, e.g. in cases of failure to accord due process ...".

IV. In this case, in addition to the Respondent having justifiably assessed the evidence with respect to the alleged misconduct, there is no showing at all that the Applicant was deprived of due process. The procedures under Personnel Directive PD/1/76 were followed satisfactorily, with the Applicant being duly informed of the alleged misconduct and given ample opportunity to respond. In this regard, the Tribunal notes the repeated assertion by the Applicant that he was being condemned for having utilized a doctor who was on the list of those recommended by the U.N. The Applicant also claims a denial of due process in not having been furnished with a list of approved doctors. These contentions are groundless. The Administration has made it abundantly clear that the Applicant was not charged with misconduct for having obtained reimbursement of payments to the named doctor or for having utilized doctors not on the approved list. While it probably would have been desirable for a list of approved doctors to have been made available to the staff, the misconduct involved only non-existent doctors.

The Tribunal also notes and rejects the Applicant's claim that the investigator's report was flawed because his findings and recommendations were allegedly based on the absence of remorse by the Applicant. While the Tribunal, like the JAB, sees some ambiguity in the language used by the investigator, it finds that the comment as to remorse related not to whether there was fraud, but whether there were mitigating factors relating to the discipline to be imposed.

V. The Applicant claims that he was treated unfairly by comparison with the less severe disciplinary action taken by UNDP against staff members guilty of the same offences under circumstances similar to those of the Applicant. Although it is true that a number of UNDP staff members in Nigeria received less severe discipline for essentially the same misconduct, it is also true that the Applicant's dismissal was consistent with the discipline criteria applied in six other cases of U.N. staff who were guilty of similar misconduct.

VI. The JAB, in considering this aspect of the case, concluded that it represented manifest injustice and inequity and, though it did not deem this sufficient to recommend cancellation of the Applicant's dismissal, thought it warranted the payment of an additional three months of net base salary, a recommendation not accepted by the Respondent.

VII. The Tribunal does not agree with the JAB on this point. Although it may be desirable, as a matter of personnel administration, to strive for consistency in disciplinary action by different organs of the Organization, the Respondent has reasonable discretion in determining the discipline to be imposed, and it is not the function of the Tribunal to substitute its views for those of the Respondent. This is particularly true where, as here, the Tribunal is being asked to compel the Respondent to impose a lenient penalty for fraud even though there was no differentiation among similarly situated U.N. staff members who were subject to disciplinary action by the Respondent. Nor was there any evidence of improper or extraneous factors motivating the Respondent's decision.

VIII. The Applicant's appeal also includes claims for within-grade salary increments and Special Post Allowance payments. The Respondent asserts that, as these claims were not among those submitted by the Applicant to the JAB, and the latter did not consider them, they are not receivable by the Tribunal pursuant to article 7.1 of the Tribunal's Statute. That appears to have been the case with respect to the claim for special post allowance since the appeal to the JAB made no mention of the subject and there appears to have been no administrative decision regarding it. Nor did the JAB

address it in its report. As to the claim for within-grade salary increment, an attachment to the appeal to the JAB made reference to it only by way of illustrating punishment already visited upon the Applicant for his alleged misconduct. The JAB report did not deal specifically with that issue. It is, however, implicit in its report that, under the circumstances, withholding of a within-grade salary increment was entirely proper and that is also the conclusion of the Tribunal.

IX. For the reasons set forth above, the application is rejected in its entirety.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
Vice-President

Francisco A. FORTEZA
Member

New York, 19 October 1990

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/485
19 October 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 485

Case No. 521: AKERELE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr. Francisco A. Forteza;

Whereas, at the request of Felicia A. Akerele, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 March 1986, the time-limit for the filing of an application to the Tribunal;

Whereas, at the request of the Applicant, the Tribunal suspended, under article 7, paragraph 5 of its Statute, the time-limit for the filing of an application, first, until 25 September 1987 and then, until 15 May 1989;

Whereas, on 11 May 1989, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 14 September 1989, the Applicant, after making the necessary corrections, again filed an application, containing the following pleas:

"II. PLEAS

8. With regard to its competence and procedure, the Applicant respectfully requests the Tribunal:

(a) to find that it is competent to hear and pass judgement upon the present application under Article 2, para. 2(a) of its Statute;

(b) to find that the present application is receivable under Article 7, para. 2(a) of its Statute;

9. On the merits, the Applicant requests the Tribunal:
(a) to find that the disciplinary measure of dismissal for misconduct was tainted by (1) the existence of two separate investigations and (2) considerations of administrative convenience and not of law;
(b) to find that said measure was also arbitrary and discriminatory;
(c) to find that the Joint Appeals Board was correct in stating that the Applicant had suffered 'manifest injustice and inequity';
(d) to order that as a consequence the dismissal for misconduct be voided, that a lesser disciplinary measure be applied and the Applicant be now reinstated;
(e) to order that the amount of compensation to be paid to the Applicant, in the event that the Secretary-General exercises the option offered him in article 9, para. 1 of the Statute, be set at one year of remuneration."

Whereas the Respondent filed his answer on 11 October 1989;

Whereas, on 31 May 1990, the Tribunal informed the parties that it adjourned its consideration of the case until the Tribunal's Autumn session;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 March 1971, as a Clerk/Typist at the G-4 level, at the United Nations Information Center (UNIC), Department of Public Information (DPI), Lagos, Nigeria. During the course of her employment with the U.N., she was offered a permanent appointment on 1 April 1975 and was promoted to the G-6 level on 1 April 1979. Her functional title was Senior Secretary.

On 22 March 1982, the Assistant Administrator, Bureau for Finance and Administration of the United Nations Development Programme (UNDP) informed the Chief, Centres Administrative Unit, Field Operations Division, DPI, that UNDP had discovered that "virtually all UNDP locally recruited staff members in [the UNDP] office in Lagos, Nigeria, [had] been submitting over the past several years fraudulent medical claims and improperly receiving reimbursement therefor under Appendix E to the Staff Rules (Medical Expense Assistance Plan)". UNDP found that a large number of staff had sought reimbursement under the Plan for services rendered by non-existent

physicians, as confirmed by the Nigeria Medical Council, with whom physicians in Nigeria are required to register. Accordingly, UNDP decided to suspend nine staff members without pay and charged all staff involved with misconduct. As a "precautionary measure", UNDP instructed the Resident Representative, who acted as Director of UNIC, to suspend processing all medical claims, including medical claims filed by U.N. locally recruited staff, pending completion of their investigation.

On 29 March 1982, the Executive Officer, DPI, wrote to the competent Personnel Officer, to inform her that, as a result of an investigation of all medical claims submitted by UNIC staff during 1980-1981, it appeared that seven staff members, including the Applicant, had submitted claims for reimbursement of medical expenses incurred for services rendered by non-existent physicians. The Applicant had been reimbursed in the amount of US$2,354.16 for claims filed for 1980 and 1981. In line with the disciplinary measures taken by UNDP against UNDP staff involved in the same scheme, he recommended that UNIC staff involved be suspended without pay pending the outcome of the investigation.

In a letter dated 2 April 1982, the Executive Officer, DPI, informed the Applicant that she was being charged with serious misconduct arising from her submission of false medical claims. The Applicant was asked to provide her version of the facts. In a reply dated 21 April 1982, the Applicant explained that she had "never been dishonest" in her life and that she had consulted those physicians "for less serious cases because their charges are moderate". She added that she was not in a position to know whether the doctors in question were registered or not because they did not show her their medical certificates before providing treatment.

On 29 April 1982, the Executive Officer, DPI, wrote to the Resident Representative, UNDP, and Acting Director, UNIC, Lagos, attaching copies of the different explanations provided by UNIC staff charged with serious misconduct, including the Applicant, and requested his views and recommendations on their cases. As a result of a further investigation and inquiries with the Nigeria Medical Council, UNDP concluded that except for four doctors who did not appear on claims by UNIC staff members, all the other doctors were "considered fictitious".

At the request of the Under-Secretary-General, DPI, the Office of Personnel Services (OPS), directed a Personnel Officer from Headquarters to conduct an investigation in Lagos, pursuant to Personnel Directive PD/1/76 concerning Disciplinary Procedure for Staff Serving at Offices away from Headquarters and Geneva. In his report dated 3 December 1982, addressed to the Director of Personnel Administration, the Personnel Officer found that:

> "... the charge of misconduct against Messrs ... and Mrs. Akerele is supported by the fact that the medical claims in question were made fraudulently, the principal proof being that the physicians and hospitals whose names were used by the claimants have been found to be fictitious and non-existent ...".

On 23 June 1983, the Assistant Secretary-General for Personnel Services submitted to the Secretary-General his recommendations for disciplinary action to be taken against the seven UNIC staff members, including the Applicant, found to have submitted several fraudulent medical claims. He stated in this regard:

> "...
>
> 13. It is my understanding that the UNDP used level of post as one of the criteria for determining whether a staff member was to be summarily dismissed or given a letter of censure...
>
> 14. My recommendations as to disciplinary measures are based on the seriousness of the misconduct by the staff member. In cases where there was a pattern of misconduct extending over a period of time, I have recommended dismissal. In the case where there was only one fraudulent submission, I have recommended suspension from duty without pay for one year.
>
> 15. I also wish to emphasize that, although the whole situation was examined from an over-all standpoint for consistency purposes, the case of each UNIC, Lagos staff member was individually examined by the Administrative Review Unit with utmost care. I am satisfied that both the provisions of Personnel Directive PD/1/76 and the fundamental requirements of due process were fully observed in each and all cases...".

He recommended that six UNIC staff members, including the Applicant, be dismissed for misconduct under Staff Rule 110.3(b). The Under-Secretary-

General for Administration and Management approved the recommendation on the Applicant's case on 19 July 1983.

On 28 July 1983, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to dismiss her for misconduct as a disciplinary measure under Staff Rule 110.3(b). He stated in this regard:

> "...
>
> The Secretary-General's decision was taken upon his finding that you submitted under the Medical Expense Assistance Plan four fraudulent medical claims thereby receiving improper reimbursement of [Nigerian naira] 931.56 or US$1567.93. The Secretary-General concluded that such behaviour constituted seriously unsatisfactory conduct warranting disciplinary action.
>
> ..."

On 29 August 1983, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 29 November 1984. Its conclusions and recommendation read as follows:

> "Conclusions and recommendation
>
> 130. The Panel finds that the documentation contained in the disciplinary file was not sufficient to support the findings of fact on the basis of which the Secretary-General made his determination of the appellant's misconduct.
>
> 131. Having reviewed the investigations carried out by UNDP and OPS of the medical claims submitted between 1980-1981 by the local staff of Lagos, and having received additional documents and testimony with regard to these investigations, the Panel finds that there was very significant circumstantial and indirect evidence to support the findings of fact that the names of doctors and hospitals appearing in four insurance claims submitted by the appellant during the period under review, were fictitious and non-existent.
>
> 132. The Panel therefore concludes that the Secretary-General had been furnished with sufficient evidentiary elements to enable him to make his determination of the appellant's misconduct with a reasonable degree of certainty.
>
> 133. Having carefully considered the appellant's observations after she had the opportunity to examine that

evidence during the appeal proceedings, the Panel further concludes that there were no reasons to believe that the outcome of the case would have been different had she been given that opportunity during the disciplinary proceedings.

134. The Panel further concludes that the disciplinary measure of dismissal imposed on the appellant appeared justified on the basis of the criterion applied to this case as explained by the Assistant Secretary-General, OPS.

135. However, the Panel notes that the UNDP administration had applied a different criterion as a result of which those staff members whose cases were similar to the appellant's from the point of view of the seriousness of the misconduct and also from the point of view of their official status, had received written sanctions.

136. The Panel therefore, without entering into the intrinsic merits of the different sanctions imposed, concludes that the application of different criteria by two authorities within the United Nations system had resulted in manifest injustice and inequity to the appellant because of the drastically different treatment of staff members in essentially similar situations.

137. The Panel does not consider that the unevenness of the situation alone could justify changing the disciplinary measure of dismissal to a less severe sanction unless there was a clear error of judgement in imposing that sanction. However, the Panel does think that the resulting inequity called for acknowledgement and, to the extent possible, relief.

138. The Panel therefore recommends that the Secretary-General grant the appellant monetary compensation in an amount equivalent to three months net base salary in recognition and mitigation of this inequity."

On 30 April 1985, the Assistant Secretary-General, OPS, informed the Applicant that the Secretary-General, having re-examined the Applicant's case in light of the JAB report, had decided:

"(a) to maintain the contested decision, and

(b) to reject the Board's recommendation for payment of compensation ..."

On 14 September 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent, in applying to UNIC staff different sanctions from those applied by UNDP to its staff, discriminated against UNIC staff and violated the principle of equal treatment.

2. The Respondent should have provided an explanation for rejecting the JAB recommendation.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision to dismiss the Applicant was justified by the evidence against her and was arrived at after due investigation and the observance of proper procedure.

2. The Secretary-General's decision to dismiss the Applicant and to refuse to accept the JAB recommendation to pay three months' compensation was a valid exercise of his discretion to impose disciplinary measures.

The Tribunal, having deliberated on 8 May in Geneva, and from 9 October to 19 October 1990 in New York, now pronounces the following judgement:

I. The Applicant served at the United Nations Information Centre (UNIC) in Lagos, Nigeria, from 1971 until 1983, when she was dismissed for misconduct. She challenges the 30 April 1985 decision of the Secretary-General maintaining his decision of 28 July 1983, to dismiss the Applicant under Staff Rule 110.3(b) for misconduct and rejecting the recommendations of the Joint Appeals Board (JAB) for payment of compensation. The nature of the misconduct with which the Applicant was charged, the various contentions of the parties and the JAB report are essentially the same as those in Judgement No. 484, Omosola (1990), rendered by the Tribunal today. As in that case, the Tribunal rejects the application here. However, because a few of the Applicant's contentions here are not formulated in the same terms as the contentions in Omosola, the Tribunal will address them.

II. The Applicant's main different contention appears to be that her dismissal for misconduct, in having submitted fraudulent claims for medical treatment, and improperly having received reimbursement therefor, was tainted by the existence of two separate investigations and alleged considerations of administrative convenience and not of law. The contention rests on the fact that the investigation leading to the Applicant's dismissal followed an investigation by UNDP of similar practices by a number of its staff members, and that for its own reasons, UNDP imposed less severe discipline than the U.N. in a number of cases. In essence, the Applicant is contending that her situation should have been included in the UNDP investigation, rather than having been the subject of a separate investigation, and that she should have been disciplined on the basis of UNDP criteria.

III. The record shows that the Applicant was not a UNDP employee. The UNDP investigation, therefore, could properly exclude the Applicant and any other UNIC employee, despite the indications that similar fraudulent practices were being followed by employees of both bodies. It was entirely within the authority of the U.N. to conduct its own investigation with respect to its staff members, and to act independently on the basis of that investigation, as it did. Whether, as the Applicant argues, poor management or elements of administrative convenience were involved is irrelevant to the issues in this case. Contrary to the Applicant's contention, the separate investigation by the U.N. was not iniquitous and was not the beginning of unlawful discriminatory treatment.

IV. The Applicant also points out that she, along with three other staff members, "recognized her offence and apologized for it". She argues that she therefore showed remorse, contrary to the findings of the investigator. The Tribunal does not read the letter of appeal of 29 August 1983, which she and others, including Mr. Omosola, signed as an admission of guilt or a statement of remorse. The "offence" referred to in the letter was not fraud, but the alleged use of unregistered doctors. Hence, her apparent belief that this should have been taken into account in the severity of the discipline to be imposed is unfounded. But even if the letter of appeal

reflected remorse, it was for the Secretary-General -- not the Tribunal -- to decide in his reasonable discretion, as he did, what disciplinary action should be imposed.

V. With respect to all of the other contentions advanced by the Applicant, the Tribunal rejects them, for the reasons set forth in the Tribunal's Judgement in Omosola with respect to similar contentions in that case.

VI. In view of the foregoing, the application is rejected in its entirety.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
Vice-President

Francisco A. FORTEZA
Member

New York, 19 October 1990

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/486
24 October 1990

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 486

Case No. 510: PICCI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Ahmed Osman, Vice-President, presiding; Mr. Samar Sen; Mr. Arnold Kean;

Whereas, at the request of Raffaello Picci, a former staff member of the United Nations Development Programme, hereinafter referred to as UNDP, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 January and 31 May 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 26 April 1989, the Applicant filed an application, containing the following pleas:

"II - PLEAS

1. I respectfully request the Tribunal:

(a) To declare that Staff Rule 109.7, as supplemented by sections 30201.1-3 and 31000.1.2 of the Personnel Manual had been infringed by the Respondent in taking the decision of limiting the renewal of my contract to 31 December 1985.

(b) To consider the totality of circumstances surrounding my separation from service and conclude, contrary to the findings of the Joint Appeals Board, that my expectation to receive a further extension of my contract was justified.

(c) Regardless of the extent of my legal expectancy and the discretionary power of the Respondent concerning renewals of contracts, to decide that the decision not to extend my contract beyond 30 June 1986, had been illegally taken, because based prevailingly, if not solely, on a Performance Review and Staff Development Report which the Respondent has accepted to remove from my personnel file, as recommended by the Joint Appeals Board, being 'an incomplete document not having been subject to an appropriate and thorough review'.

(d) To recognize the specific responsibility of the Respondent for the unfair and partial assessment of my performance, including the libellous statements contained in my Performance Review and Staff Development Report, also in view of the testimonies received and submitted hereby, whether or not this negative assessment had been the only reason for not renewing my contract.

(e) To order the Secretary-General to pay an adequate compensation to me for illegal actions taken, anguish, injury and defamation.

(f) To order the Secretary-General that my Performance Review and Staff Development Report in question be retained in my personnel file, along with all pertinent documents including the Report of the Joint Appeals Board accepted by the Secretary-General and all testimonies received on my case, to be read as a single document."

Whereas the Respondent filed his answer on 11 July 1989;

Whereas the Applicant filed written observations on 2 September 1989;

Whereas, on 31 May 1990, the Executive Secretary of the Tribunal informed the parties that the Tribunal had decided to adjourn its consideration of the case until its next session, to be held in New York in October 1990;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 21 October 1975. He was initially offered a two-year fixed-term appointment as a Programme Officer at the P-4, Step I level. He served thereafter on a succession of fixed-term appointments, initially at Headquarters and then in the field, from 1981 until October 1983, as Deputy Resident Representative in Djibouti, and subsequently, until the expiration of his last fixed-term appointment,

as Deputy Resident Representative in Guyana. During his period of service with UNDP, the Applicant was on leave of absence from his post in the Italian Ministry of the Treasury.

During his employment with UNDP, the Applicant's performance was evaluated in different Performance Review and Staff Development reports (performance reports). In a first performance report, covering his period of service from October 1975 to January 1977, he was rated "among the majority [of staff] who perform well and produce performance results expected of a well qualified, competent staff member". In a second performance report, covering his period of service from February 1977 through December 1978, he was rated as "a competent and well qualified staff member whose performance meets expected standards". In a third performance report, covering his period of service from 1 January 1979 to 29 June 1979, the Applicant was rated as "an excellent staff member whose performance exceeds expected standards". In a fourth performance report, covering his period of service from June 1979 through October 1980, he was rated as a "competent and well qualified staff member whose performance meets expected standards". In a fifth performance report, covering his period of service from January 1981 through April 1983, he was rated by one supervisor as "a competent and well qualified staff member whose performance meets expected standards" and by another as "an excellent staff member whose performance exceeds expected standards".

The Applicant was transferred to Guyana in January 1984 and was offered a two-year fixed-term appointment at the P-4, Step IX level, with an expiration date of 20 October 1985.

In a performance report, covering his period of service from January 1984 to August 1985, the then Resident Representative in Guyana rated the Applicant as "a staff member whose performance does not meet expected standards in all respects". In a section containing general comments on performance, the Resident Representative noted that the Applicant had "not fulfilled expectations in several ... important respects and there [was] consequently some doubt as to whether he would be able to perform at more than a routine level should there be a prolonged absence of the R.R. [Resident Representative]". According to the Applicant, the performance

report was presented to him "without any previous discussion, nor any previous direct or indirect warning" indicating that the Resident Representative was not satisfied with his performance.

On 6 September 1985, the Applicant wrote to the Chief, Staff Development and Placement Section, Division of Personnel (DOP) at Headquarters, questioning the assessment by the Resident Representative in Guyana, and asking that "no action be taken until the matters raised have been fully reviewed and clarified". In a cable dated 25 October 1985, the Chief, Administrative Section, DOP, sought the Resident Representative's and the Applicant's concurrence to a further extension of the Applicant's appointment, which had expired on 20 October 1985, through 31 December 1985, pending the completion and consideration of his performance report. In a reply dated 1 November 1985, the Applicant argued essentially that the recommendation submitted after expiration of his appointment was in contravention of Staff Rule 109.7, and pertinent Sections of the UNDP Personnel Manual; that statements in his most recent performance report were not supported by evidence and that the report conflicted with assessments in his prior performance reports. The Applicant asked for authorization to come to Headquarters to discuss the matter.

On 5 December 1985, the Applicant wrote to the Director, DOP, to inform him that, in accordance with the applicable rules of the UNDP Personnel Manual, he was instituting a rebuttal procedure against the performance report, evaluating his performance in Guyana by the Resident Representative. On 26 December 1985, the Applicant submitted a complaint to the UNDP Ombudsman Panel and on 16 January 1986, he transmitted to the Director, DOP, his statement of rebuttal dated 5 October 1985, the submission of which he had deferred pending possible further review of his case.

On 21 January 1986, the Director, DOP, asked the Assistant Administrator and Regional Director, Regional Bureau for Latin America and the Caribbean, to conduct an impartial investigation of the matter and provide an appraisal of the rebuttal. An Investigative Panel was subsequently constituted to that effect.

In a cable dated 26 February 1986, the Deputy Director, DOP, informed the Applicant that his appointment had been extended through 31 March 1986,

and that the Administration did not envisage any further offer of renewal of appointment. At the Applicant's request for further clarification of his contractual situation, the Deputy Director, DOP, confirmed on 1 March 1986, that his appointment had been extended through 31 March 1986, and that if he should be unable to report to his post with the Italian Government before 1 June 1986, he would be placed on special leave with full pay until 31 May 1986. The Applicant was in fact placed on special leave with full pay from 28 March 1986, the date of his departure from Guyana, through 30 June 1986.

In a letter dated 22 March 1986, the Applicant asked the Secretary-General to review the administrative decision not to extend his appointment beyond 31 March 1986. Having received no reply from the Secretary-General, on 26 June 1986, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against this decision. On 30 June 1986, the Applicant was separated from the service of UNDP.

On 1 August 1986, the Assistant Administrator and Regional Director, Regional Bureau for Latin America and the Caribbean, transmitted to the Director, DOP, in accordance with UNDP/ADM/HQIRS/372/Rev.1, the report of the Investigative Panel which had been established to investigate the Applicant's rebuttal. The report concluded that the overall rating contained in the Applicant's performance report was accurate.

On 8 September 1986, the Applicant requested the Secretary-General to review the Panel's report. In a letter dated 14 November 1986, the Assistant Secretary-General for Personnel Services informed the Applicant that fixed-term appointments carry no expectancy of renewal and that there were no grounds to reverse the Panel's decision.

On 19 November 1986, the Applicant lodged a second appeal to the JAB, in which he contested the administrative decision not to extend his appointment and requested compensation for the allegations contained in his last performance report. In addition, he appealed against the conclusions of the Investigative Panel, accepted by the Administration of UNDP. The Board adopted its report on 26 September 1988. Its considerations, conclusions and recommendation read as follows:

"Considerations and conclusions

31. The Panel concluded that the appellant had no legal expectancy of renewal. As a rule, fixed-term appointments do

not carry a right of renewal. Staff Rule 104.12(b) is very clear and the letters of appointment signed by the appellant confirm the position. The Panel recognized the fact that the jurisprudence of the United Nations [Administrative] Tribunal had indicated that it had to consider 'the totality of circumstances surrounding a staff member's separation', and the Panel could not agree in this case that there was a clear and specific legal expectancy.

32. The Panel concluded also that the appraisal of the appellant's rebuttal of his PRR [Performance Review Report] was superficial, and could not be accepted as having satisfied the requirement for a fair, equitable and serious consideration of the rebuttal. The Panel composed for rebuttal consideration confined its review to telephone calls to the three Reporting Officers. Therefore, the PRR must be regarded as an incomplete document which should not be retained as part of the official status file of the appellant.

33. The Panel agreed that the UNDP administration had not respected its rules and procedures, not only with respect to reconsideration of the rebuttal, but also in not having given the appellant due written notice of his shortcomings and thus an opportunity to improve. The Panel also concluded that not to advise the appellant until after the expiry of his contract that he would not get another two-year renewal was insensitive.

34. The Panel noted, however, that the UNDP administration gave the appellant two contracts, each of three months, to enable the rebuttal and review process to be completed. He was also granted a further three months leave with pay to enable him to effect the transition back to the employ of his government.

35. The Panel concluded that these measures adequately compensated the appellant for the somewhat irregular circumstances surrounding his separation from service. Accordingly, no further compensation for any anguish or injury was deemed fit. As for the appellant's request for compensation for the alleged 'slander' contained in the PRR, the Panel found that the appellant had not sustained the burden of proof required to support a contention that the PRR was tainted by prejudice or other extraneous factors, let alone constitute [a] slander of his person.

Recommendation

36. The Panel recommends unanimously that the PRR covering the period of the appellant's service in Guyana be removed

from the appellant's personnel file, since it is an incomplete document, not having been subject to an appropriate and thorough review.

37. The Panel makes no other recommendation in support of the appeal."

On 29 September 1988, the Officer-in-Charge of the Department of Administration and Management transmitted to the Applicant a copy of the Board's report and informed him that:

"The Secretary-General, having re-examined your cases in the light of the Board's report, has decided to maintain the contested decision of non-renewal of your fixed-term appointment. The Secretary-General has also decided to accept the Board's unanimous recommendation to remove your incomplete performance review and staff development report covering the period of your service in Guyana from January 1984 to August 1985 from your official status file and to take no further action on the matter."

On 10 November 1988, the Board adopted the following supplementary comments and transmitted them to the Under-Secretary General for Administration and Management:

"1. We refer to the report ... to you concerning the case of Mr. Raffaello Picci and to the subsequent memorandum (copied to you) of 4 October 1988 to appellant and counsel. You will recall that counsel had been given an extended deadline to submit observations on the Respondent's reply but the report was concluded inadvertently before that extended deadline.

2. On 20 October 1988, the observations of counsel on the reply were received. The members of the Panel have examined carefully this submission and they have agreed to the following considerations.

3. The Panel accepts much of the analysis of facts and issues presented by counsel, especially as they relate to the questions of efficiency and other aspects of the appellant's performance. The observations of counsel and the attached material confirm the Panel's view that the rebuttal of the final PRR for the appellant was not properly or appropriately reviewed and the PRR was moreover inexplicably at odds with his previous performance history. Accordingly, the Panel can only maintain its earlier recommendation that this document be removed from the appellant's official status file.

4. The appellant was on a fixed-term contract. The appellant himself favoured a continuation of these appointments so that he could retain his position in the Italian Civil Service. The Panel found that there was no clear and specific legal expectancy of renewal.

5. The only residual matter is that of compensation. Counsel has argued that removal of unfounded allegations is insufficient compensation. The Panel had already considered the possibility of monetary compensation. It maintains its opinion that, since the appellant's service was extended for six months to allow resolution of the review process and that he was given a further three months leave with pay, he had already received adequate compensation for the irregularities surrounding the non-renewal of his contract.

6. Accordingly, the Panel proposes that its earlier recommendations in paragraphs 36 and 37 of Report ... be maintained."

On 29 November 1988, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the Board's supplementary comments and informed him that:

"The Secretary-General has re-examined your cases in the light of the Board's additional comments in its memorandum of 10 November 1988 and taken note of its unanimous proposal that its earlier recommendations ... be maintained. Following full acceptance and implementation of the Board's earlier recommendations, as indicated in the letter to you, dated 29 September 1988 (...), the Secretary-General has therefore decided to take no further action on the matter."

On 26 April 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a legal expectancy of renewal of his fixed-term appointment.

2. The Applicant's separation from service was motivated by an invalid performance report.

3. The evaluation of the Applicant's performance by the Resident Representative in Guyana was tainted by prejudice and extraneous factors.

4. The removal of the Applicant's last performance report from his personnel file did not represent a suitable solution nor adequate compensation.

Whereas the Respondent's principal contentions are:

1. The decision to limit the renewal of the Applicant's appointment did not infringe his rights.

2. The decision not to renew the Applicant's final appointment beyond 30 June 1986, did not infringe his rights.

3. The Applicant's fixed-term appointment expired automatically and carried no expectation of renewal; the Applicant was accorded due process throughout the period during which he challenged the non-renewal decision.

4. The Applicant is not entitled to compensation for evaluations contained in his final performance report. The Tribunal is not competent to examine whether the contents of the final performance report accurately reflect his performance.

5. There is no merit in the Applicant's allegation that the final performance report contains slander.

The Tribunal, having deliberated on 9 May 1990 in Geneva and from 15 October to 24 October 1990 in New York, now pronounces the following judgement:

I. The Tribunal has examined all aspects of the Applicant's claim to a legal expectancy of a further contract after the expiration of his fixed-term contract on 31 March 1986. In particular, it has taken into consideration the Applicant's ten years of good service on a series of fixed-term contracts from 1975 to 1986.

II. In Judgement No. 305, Jabbour (1983), para. I, the Tribunal stated that it:

> "...has considered that after a staff member has been retained in service by a series of short-term contracts for many years and has rendered satisfactory services to the United Nations he can reasonably expect a measure of accommodation either in the form of extension or renewal of short-term contracts or by the Respondent trying in good faith and earnestly to find him some alternative employment". (emphasis added)

In that case, however, "many years" meant about 15 years.

In Judgement No. 422, Sawhney (1988), para. X, the Tribunal stated that it considered:

> "... that a series of successive fixed-term appointments by itself is not enough to detract from the effect of Staff Rule 104.12(b), which stipulates that fixed-term appointments carry no right of renewal or conversion to any other type of appointment. ... According to Staff Rule 109.7(a), such appointments expire automatically and without prior notice." (emphasis added)

III. The Tribunal concludes that, in each case where the Applicant claims a legal expectancy of renewal or extension of service after the expiry of his fixed-term appointments, it is necessary to examine all the circumstances to justify the expectation of the Applicant that he would continue to be employed. (Cf. Judgement No. 142. Bhattacharyya (1971); Judgement No. 205, El Naggar (1975)). In the present case, the Tribunal finds that no such expectation was justified.

IV. The Applicant relies on a further argument, summarized in paragraph 1(c) of his pleas; he contends that the decision not to extend his contract beyond 30 June 1986, was illegally taken, because it was "based prevailingly" on a Performance Review and Staff Development Report (performance report) which, on the recommendation of the Joint Appeals Board (JAB), the Respondent has removed from the Applicant's personnel file as being "an incomplete document, not having been subject to an appropriate and thorough review".

V. The Tribunal has examined the performance report de novo. The Tribunal is neither competent nor required to substitute its own opinion for that of the reporting officers, but it has considered whether the contested decision was vitiated by lack of due process, or by prejudice, arbitrariness or failure to comply with the prescribed procedure.

VI. The Tribunal shares the view of the JAB that there is no evidence that the performance report and its rebuttal were tainted by prejudice or other extraneous factors. The rebuttal to his performance report was submitted to an Investigative Panel, which did not find prejudice or other extraneous factors.

VII. The Applicant, therefore, prima facie enjoyed a measure of due process. Nevertheless, the whole procedure leading to his separation from UNDP did, in the view of the Tribunal, fall short of the full requirement of due process of law, for several reasons.

VIII. In the first place, the Tribunal must dismiss as unrealistic the Respondent's contention that the performance report, and subsequent events in connection with it, did not influence his decision not to renew or extend the Applicant's employment: two such closely-allied matters cannot be easily isolated for separate consideration. The Tribunal is satisfied that the performance report must, to some extent, have influenced the decision and contributed to the Applicant's separation, and that reliance cannot be placed on the assertion, made to the Applicant by the Office of the Administrator, that the outcome of the rebuttal process would have "no bearing" on the "decision [as to] separation, which [was] based inter alia on prior performance records". Furthermore, the supposedly adverse prior performance records on which the decision was said to be based have never in fact been produced. On the contrary, the Applicant's personnel file contains a series of very commendable evaluations by different supervisors.

IX. Secondly, the rebuttal process, though at first sight adequate, was in fact superficially conducted, and has been criticised by the JAB because it consisted of nothing more than telephone calls to the three reporting officers.

X. Thirdly, the Applicant was entitled to the benefit of the relevant rules, regulations and guidelines of the Organization. In particular, the Resident Representative made the unfavourable performance report without prior warning to the Applicant. This was, moreover, the Applicant's first negative assessment in ten years of service. In the Tribunal's view, the Resident Representative also failed to comply with Section 4 of Appendix 5.0 to the UNDP Personnel Manual, "Guidelines for Completing Performance Review and Staff Development Report", reading as follows:

> "The joint review should be part of a continuing dialogue between staff member and supervisor ... The staff member should be shown the comments and ratings in Sections 2 and 3, and any clarifications required should be given before this section (sic) is completed."

The failure to comply with these guidelines without proper cause amounts, in the Tribunal's view, to maladministration. When asked by the two investigating officers why she had not discussed the performance report with the Applicant before it was signed, the Resident Representative replied only that it was "not her style", and that the staff member already knew enough to require no help from a dialogue. This, in the Tribunal's view, is unacceptable and cannot remotely be justified, resulting, in the Applicant being ambushed, as it were, by an unfavourable performance report of which he had no prior warning.

XI. The Tribunal considers that this high-handed manner of dealing with the Applicant's performance report, entitles him to compensation for maladministration which necessarily influenced his separation from the Organization.

XII. The Tribunal does not share the view of the JAB that, "since the [Applicant's] service was extended for six months ... and ... he was given a further three months leave with pay, he had already received adequate compensation ...". Accordingly, the Tribunal orders the Respondent to pay to the Applicant one year's net base salary, minus the three months of pay on special leave already received, as compensation for the consequences of the maladministration by the Respondent.

XIII. The Applicant also claims damages for slander, on the basis of his unsatisfactory performance report. It is unnecessary to go into the technicalities of the law of defamation, inasmuch as whatever compensation might have been awarded on that account is subsumed in the compensation awarded to the Applicant for the maladministration from which he suffered.

XIV. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the amount of one year's net base salary, at the rate in effect at the time of the Applicant's separation from service, minus the three months of pay on special leave already received by the Applicant.

XV. The Applicant has asked that:

> "[his] Performance Review and Staff Development Report in question be retained in [his] personnel file, along with all pertinent documents including the Report of the Joint Appeals Board accepted by the Secretary-General and all testimonies received on [his] case, to be read as a single document"

and the Tribunal orders the Respondent to grant the Applicant's request.

XVI. All other pleas of the Applicant are rejected.

(Signatures)

Ahmed OSMAN
Vice-President, presiding

Samar SEN
Member

Arnold KEAN
Member

New York, 24 October 1990

R. Maria Vicien-Milburn
Executive Secretary